No. 93-610

Supreme Court, U.S.
AUG 16 1993

In The

Supreme Court of the United States

October Term, 1993

ANTHONY McDONALD, JR.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether when a government agency charged with criminal investigations and consequently the gathering of evidence fails to have in place a system of properly preserving said evidence, and as a result of this failure evidence is lost or destroyed, the burden should shift to the government to justify admission of related evidence as opposed to the defendant's having to prove the materiality of the evidence and the reasonable probability of its production changing the results of trial.

2.

Whether when a government agency charged with criminal investigations fails to have in place a system of properly preserving evidence and as a result thereof evidence is either lost or destroyed and in addition to such loss the government through negligence loses or destroys additional material evidence to the defense, sanctions should apply.

PARTIES

The names of all parties to the proceeding in the Court whose order and judgment is sought to be reviewed here appear in the caption of the case.

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UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY McDONALD, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

Following his conviction after trial in the district court for the Southern District of New York, McDonald appealed his conviction to the United States Court of appeals for the Second Circuit, Nos. 1239, 1240-AUGUST TERM, 1992. The decision was not officially reported. It appears in Appendix B hereto at A-14

A motion was made in the United States District Court for the Southern District of New York, Louis Stanton, Judge to dismiss the indictment. The motion was denied. The decision was not reported. it appears as Appendix E hereto at A40

A motion was made in the united States District Court for the Southern District of New York, Louis Stanton, Judge to dismiss all counts under Rule 29 of the federal Rules of Criminal procedure. The motion was denied. It appears herein as Appendix F hereto at A-43.

STATEMENT OF JURISDICTION

The order and opinion of the Court of Appeals for the Second Circuit was entered on May 17, 1993. This petition is filed in accordance with Rule 13.1 of this Court, within 90 days of the date of denial of McDonald's appeal.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision is as follows:

AMENDMENT 5

No person shall be held to answer . . . nor be deprived of life, liberty, or property without due process of law . . ..

STATEMENT OF THE CASE

A. Statement of Facts

Anthony McDonald, along with his co-defendant Farhad Bakhtiar, was convicted after trial in the United States District Court for the Southern District of new York, Louis L. Stanton,*Judge*, of charges of conspiracy, bank fraud, wire fraud, money laundering, illegal monetary transactions using proceeds of criminal activity, and possession and transportation of forged and counterfeit checks, violations of respectively, 18 U.S.C. 371, 1344,1343, 1956(a)(2)(B), 1957, 513(a), and 2314 (1988 and Supp. III 1991). (Appendix A-1)

The charges stemmed from the defendant's involvement in two separate schemes to defraud two banks. In the first, the Bank of New York ("BNY") scheme, Bakhtiar and McDonald as well as three others who previously had pled guilty and were the conceded leaders of the scheme, Joseph Conetta, Joseph Lipson, and Joseph Ruffalo, defrauded the BNY of $232,831.52 in unclaimed interest. BNY maintained a separate account for such unclaimed interest.

Ruffalo had a contact at the bank but needed an entity to make the claim for the interest. Lipson contacted McDonald who contacted Bakhtiar. Bakhtiar was a principle in a securities firm in Switzerland called First Securities, S.A. ("First Securities") and a consulting firm called A & B Investment Advisory ("A & B").

Following instructions from Bakhtiar, Ruffalo and Lipson opened a fictitious account at First Securities and made a claim for the interest through Bakhtiar's firm, A&B. A check was cashed through Bakhtiar's firm and the funds subsequently transported to New York.

As to the second scheme Ruffalo had yet another contact who had access to a printer who could manufacture counterfeit checks and also a contact who had access to checks at a financial institution. A plan was put in place to defraud Security Pacific National Bank ("Security Pacific") by using counterfeit checks drawn on Shearson Lehman Hutton ("Shearson") accounts at security Pacific's La Jolla, California, branch. Check numbers from the Shearson account were used in making the counterfeit checks which were drawn on fictitious companies allegedly based in the Middle East.

Conetta and Ruffalo mailed two checks for $474,000 and $437,000 to Bakhtiar at First Securities. The two checks totaling $911,000, were deposited in Dubai, United Arab Emirates. Subsequently $250,000 was wired to New York and $300,000 was transported to New York by an associate of Bakhtiar. McDonald gained about $20,000 from both schemes.

Conetta, Lipson and Ruffalo suggested a third scheme to defraud Drexel, Burnham, Lambert, Inc. ("Drexel") of unclaimed interest payments. At this time however all three were arrested for yet another illegal scheme.

After entering a guilty plea and agreeing to work for the government Lipson wore a wire in a number of meetings with McDonald related to the Drexel scheme and other matters.

During the course of the investigation the government lost or destroyed numerous pieces of evidence:

A. MISSING TAPE RECORDINGS

(1) Five tapes of six conversations between Lipson and another individual, Charles Chitty, a cooperating informant, due to the Secret Service's inadequate procedures for the preservation of evidence. According to sketchy Secret Service logs, the first two tapes concerned a Treasury bond scheme in which the defendant was not involved, the third set up a meeting, and the remaining two concerned the Drexel scheme. One of the logs states that Lipson wanted to do the entire (illegal Drexel) deal through Chitty. The sixth conversation was not summarized. (The defendant was not formally charged in the Drexel scheme but the government had alleged it was part of the same conspiracy as indicated in its letter of March 6, 1992.

(2) The government's failure to notify the defendant Bakhtiar of these exculpatory statements which in turn impacted on McDonald as Bakhtiar was for the most part the only co-conspirator with whom McDonald interacted.

(3) A tape of an April 1, 1991 conversation, between McDonald and Ellison, another co-operating informant in which in response to an attempt by Ellison to solicit a bribe of Bakhtiar through McDonald, McDonald, according to the government's own witness, called Ellison a "cheap crook" or used words to that effect.

Additionally, the attempted concealment by the Secret Service of a memo concerning this recording.

(4) A 45 second gap in a tape of a March 29, 1991 conversation between Ellison and Bakhtiar. Having consulted with agents of the Secret Service the government then gave completely different explanations for the gap in the recording. The government introduced material only before the gap. (Appendix C at A-34 and Appendix D at A-36)

B. ADDITIONAL EVIDENCE NOT PRODUCED BY THE GOVERNMENT:

(5) Currency transaction forms from the courier's trip to New York carrying $300,000 in which she advised U. S. Customs that the money was to be used to purchase real estate; this form would have buttressed the claim that the money was brought here for that purpose rather than to pay off conspirators.

(6) The original counterfeit checks, even though they had originally been in the government's possession but had then been sent to the prosecuting authorities in Dubai.

(7) The production of only one set of notes of a Feb. 7, 1991 meeting between Conetta and Federal agents following Conetta's arrest despite Conetta's testimony that more than one agent had taken notes of the meeting. (No other agents remember taking any notes)

The main evidence against McDonald aside from the testimony of two informants was a series of unintercepted phone conversations between Bakhtiar and McDonald which the government implied concerned the conspiracy even though a government witness stated both participants had legitimate business dealings; and McDonald's appearance at the airport along with other co-conspirators to meet the courier on one occasion.

The tapes which were "lost" could have aided McDonald as impeachment material in that they would have shown that Bakhtiar was not likely to have become involved in illegal activity and thus would have helped establish the legitimacy of the phone calls between he and Bakhtiar; and secondly in the case of the April 1, 1991 tape would have provided direct evidence of McDonald's reluctance to join in illegal activity.

The district court concluded that there was no reason to believe the defendant's claims that the missing evidence would have been exculpatory.

The Secret Service's only procedure for preservation of the tapes is outlined in its regulation labeled "TELEPHONE and NON-TELEPHONE INTERCEPTIONS" which is found herein at Appendix G at A46

It contains no procedures for preservation and chain-of-custody procedures which stands in stark contrast to other federal investigatory agencies such as the Federal Bureau of Investigation.

B. Prior Proceedings

The District Court denied a motion brought during trial for dismissal of all charges based on the "Brady" and "3500" violation. (Appendix E at A-40 and Appendix F at A-43).

REASONS FOR GRANTING THE WRIT

I. WHEN EVIDENCE MATERIAL TO A DEFENDANT IS MISPLACED OR DESTROYED BECAUSE A GOVERNMENTAL AGENCY CHARGED WITH THE INVESTIGATION OF CRIMINAL MATTERS FAILS TO HAVE IN PLACE A SYSTEM FOR THE PRESERVATION OF EVIDENCE THE BURDEN SHOULD SHIFT TO THE GOVERNMENT TO JUSTIFY THE "LOSS" OTHERWISE SANCTIONS SHOULD APPLY

It is not contested that the government either lost or failed to disclose evidence. The Secret Service, a governmental agency which is charged with the gathering of evidence in criminal investigations has no organized process by which it preserves such evidence. It's skimpy process is described in its own internal rule a copy of which is found in Appendix G at A46.

The government is clearly obligated to produce exculpatory evidence. *Brady v. Maryland* 373 U 111 S. Ct. 2811.S. 83 (1963). Under the established case law a conviction must be reversed if the government fails to disclose exculpatory or impeachment evidence if there is a "reasonable probability" that the results of the trial would have been different if the evidence had been disclosed. *United States v. Bagley*, 473 U.S. 667 (1985).

The case law presently holds that each case must be examined individually for the government's culpability to determine if sanctions should be applied. *United States v. Grammitikos*, 633 F. 2d. 1013 (2d. Cir 1980); *United States v. Morgenstern*, 933 F2d. 1108, 1115-6 (2d. Cir. 1991); *United States v. Maldonato-Rivera*, 922 F. 2d.934,954-55 (2d. Cir. 1990), *cert. den.* 111 S.Ct. 2811;

United States v. Rastelli, 870 F 2d 822, 833-34 (2d. Cir.), *cert. den.* 493 U.S. 982 (1989); *United States v. Buffalino*, 576 F. 2d. 446, 449 (2d. Cir), *cert. den.* 439 U.S. 928 (1978).

Current Case law suggests the government must act in bad faith before a defendant may obtain relief. *Arizona v. Youngblood*, 488

U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 478, 488-89 (1984).

The "reasonable probability" test which the defendant must meet in order to achieve a reversal of conviction after successfully showing a failure by the government to produce evidence inevitably places the defendant in a "Catch 22" situation. The test is difficult to meet precisely because without the evidence itself it is hard, if not impossible, to demonstrate its importance.

Indeed a defendant charged with a serious crime finds himself facing a challenge of great magnitude. As in the instant case where a defendant must establish the importance of the "lost evidence" his statements about same is suspect and his motive to distort obvious. It is virtually impossible to meet such a test and thus revision of the

standard is necessary in instances such as occurred here wherein an important government agency charged with the investigation of criminal cases admittedly failed to have in place a systematic organization for the preservation of the evidence it gathers.

The district court found that there was no materiality to the lost tapes but of course this finding was of necessity based on the skimpy and indeed almost non-existence of any memorialization of the missing material. The defendant therefore not having met the materiality aspect of the test, the court was forced to deny him relief. Thus the test of materiality when applied to the loss of evidence by a governmental body of such importance should be changed.

When evidence which was not only in the exclusive control and custody of such a governmental agency but was in fact created by the agency by its use of informants who secretly recorded conversations of targets of criminal investigations is not produced, then the government should bear a substantial burden of justification as to why the prosecuting arm of the government should not be precluded from producing any evidence about the topic of said lost evidence.

It makes sense that the party which was in sole possession of the evidence should bear the burden of explanation rather than the party which never had access to the evidence in the first place.

The uniqueness of the missing evidence issue here is the fact that a) one of the Secret Service's main functions is to gather evidence in criminal investigations, b) as such, said agency, as well as any similarly functioning agency, should be expected to maintain a reasonable if not high standard for the gathering and preservation of evidence and c) the agency has complete control not only over the gathering of evidence but in certain cases, as here, in the very creation of evidence, via tape recording conversations of targets of its investigations.

While conceding that any governmental agency need not be expected to be immune from human error there are nevertheless important,substantial and easily applied safeguards which should be in place with regard any important governmental body which has as a substantial part of its very reason to exist the function of gathering evidence in criminal investigations. When such an agency fails to establish such a system a localized preclusion should be the remedy.

Such a remedy would be easy to apply and would not be subject to abuse or lengthy litigation. If the particular agency met a judicially determined standard of reasonable procedure than if evidence were not produced the state of the current law could apply.

However, the burden must shift to the government when such an agency fails to produce evidence which the agency itself has gathered. To require less opens the door for unfettered governmental abuse and a fundamental mistrust of the judicial process.

To permit a governmental investigatory body as substantial as the United States Secret Service to function without a fundamental plan in place to preserve evidence is to allow for potentially repeated abuses of negligence and indeed perhaps deliberate destruction of evidence. The only way to protect Brady material is to require the government to protect potentially exculpatory evidence. *United States v. Bryant* 439 F.2d 642 (D.C. Cir. 1971).

The remedy for such unexcused abuse should be preclusion of entry of any evidence by the government concerning the issue in question and in drastic cases more severe sanctions should apply.

II. WHEN EVIDENCE MATERIAL TO A DEFENDANT IS MISPLACED OR DESTROYED BECAUSE A GOVERNMENTAL AGENCY CHARGED WITH THE INVESTIGATION CRIMINAL MATTERS WHICH FAILS TO HAVE IN PLACE A SYSTEM FOR THE PRESERVATION OF EVIDENCE AND ADDITIONALLY THE GOVERNMENT LOSES OR OTHERWISE FAILS TO PRODUCE OTHER EVIDENCE MATERIAL TO THE DEFENSE SANCTIONS SHOULD APPLY TO THE GOVERNMENT'S CASE.

Here aside from the evidence which was lost or destroyed by the Secret Service much additional evidence was also either misplaced, lost, destroyed or otherwise not produced to the defense by the government. It is simply against the basic concept of due process of law to require a defendant to prove the additional materiality and reasonable probability of a different jury verdict before he can receive relief from the court. *United States v. Bagley*, 473 U.S. 667 (1985). Under such circumstances the government should have the burden of justifying the reason for its loss.

CONCLUSION

For these reasons a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

DATED: August 13, 1993

Respectfully submitted,

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APPENDICES

APPENDIX A—COPY OF INDICTMENT

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR.,

Defendants.

INDICTMENT

S1 91 Cr. 782 (LLS)

COUNT ONE

The Grand Jury charges:

The Conspiracy

1. From in or about December 1989 up to and including in or about April 1991, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and Joseph Lipson, Joseph Conetta, Joseph Ruffalo, co-conspirators not named as defendants herein, and others known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, specifically, to violate Sections 1343, 1344, 2314, 1957, 1956(a)(2)(B), 513(a) and 1956(a)(1)(B) of Title 18, United States Code.

Goal of the Conspiracy

2. It was the goal of the conspiracy to defraud banks located in the United States, transport the proceeds of the fraud in the form of checks to Switzerland, and then bring back the funds, minus a commission, the United States in the form of United States currency in a manner that concealed and disguised the nature, location, source, ownership and control of the fraudulently obtained funds.

Objects of the Conspiracy

3. It was a part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, having devised a scheme and artifice to defraud and for obtaining money and property from federally insured financial institutions by means of false and fraudulent pretenses, representations, and promises, unlawfully, wilfully and knowingly, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds for the purpose of executing such scheme and artifice, in violation of Section 1343 of Title 18, United States Code.

4. It was a part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, unlawfully, wilfully, and knowingly, would and did execute and attempt to execute a scheme and artifice to defraud and to obtain moneys, funds, credits, assets, securities and property, owned by and under the custody and control of federally insured financial institutions, by means of false and fraudulent pretenses and representations, in violation of Section 1344 of Title 18, United States Code.

5. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators,

unlawfully, wilfully, and knowingly, would and did transport, transmit, and transfer in interstate and foreign commerce, securities and money, knowing the same to have been taken by stolen, converted and taken by fraud, in violation of Section 2314 of Title 18, United States Code.

6. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, unlawfully, wilfully, and knowingly, would and did engage and attempt to engage in monetary transactions in criminally derived property of a value greater than $10,000, which represented the proceeds of specified unlawful activity, in violation of Section 1957 of Title 18, United States Code.

7. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, unlawfully, wilfully, and knowingly, would and did transport, transmit and transfer and attempt to transport, transmit and transfer, monetary instruments and funds from a place in the United States to and through a place outside the United States, and to a place in the United States from and through a place outside the United States, knowing that the monetary instrument and funds involved in the transportion represented the proceeds of specified unlawful activity, and knowing that such transportation was designed in whole and in part to conceal and disguise the nature, location, source, ownership and the control of the proceeds of that unlawful activity, in violation of Section 1956(a)(2)(B) of Title 18, United States Code.

8. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, unlawfully, knowingly, and wilfully, would and did make, utter and possess counterfeit and forged securities of an organization with the

intent to deceive another person and organization, in violation of Section 513(a) of Title 18, United States Code.

9. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, unlawfully, wilfully, and knowingly, would and did transport, transmit, and transfer in interstate and foreign commerce, falsely made, forged, altered and counterfeit securities, knowing the same to be falsely made, forged, altered and counterfeited, in violation of Section 2314 of Title 18, United States Code.

10. It was a further part and an object of the conspiracy that FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, and their co-conspirators, knowing that the property involved in financial transactions represented the proceeds of some form of unlawful activity, unlawfully, wilfully and knowingly, would and did conduct and attempt to conduct financial transactions which in fact involved the proceeds of specified unlawful activity, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of the specified unlawful activity, in violation of Section 1956(a)(1)(B) of Title 18, United States Code.

OVERT ACTS

11. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a) In or about December 1989, Joseph Lipson and the defendants, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., met at the Pierre Hotel, Manhattan.

b) In or about February 1990, in Manhattan, the defendant, ANTHONY M. McDONALD, JR., provided to Joseph Lipson, an

account opening form to open an account with a company in Geneva, Switzerland.

c) On or about February 22, 1990, Joseph Lipson and Joseph Conetta dropped off a package containing a completed account opening form in the name of JJJ Trading at Complete Mail Center, 28 Vesey Street, Manhattan, for delivery by Airborne courier to the defendant FARHAD BAKHTIAR-BAKHTIARI at A&B Investment Advisory, 44 Avenue Krieg, in Geneva, Switzerland.

d) On or about February 23, 1990, Joseph Lipson and Joseph Conetta dropped off a package containing one Bank of New York check at Complete Mail Center, 28 Vesey Street, Manhattan, for delivery by Airborne courier to the defendant FARHAD BAKHTIAR-BAKHTIAR at A & B Investment Advisory, 44 Avenue Krieg, in Geneva, Switzerland.

e) On or about March 8, 1990, at the Mark Hotel at 25 East 77th Street, Manhattan, Joseph Lipson and Joseph Conetta received a large sum of United States currency from FARHAD BAKHTIAR-BAKHTIARI via courier.

f) On or about March 8, 1990, at Dock's Restaurant in Manhattan, ANTHONY M. McDONALD, JR., the defendant, received approximately $20,000.00 in United States currency from Joseph Lipson.

g) On or about April 3, 1990, Joseph Conetta dropped off a package containing approximately four to six checks at Complete Mail Center, 28 Vesey Street, Manhattan, for delivery by DHL courier to the defendant, FARHAD BAKHTIAR-BAKHTIARI at First Securities, 44 Avenue Krieg, Geneva, Switzerland.

h) In or about April 1990, at John F. Kennedy International Airport, New York, Joseph Lipson and ANTHONY M. McDONALD, JR., the defendant, received from FARHAD

BAKHTIAR-BAKHTIARI via courier, a large sum of United States currency.

i) In or about April 1990, Joseph Lipson and ANTHONY M. McDONALD, JR., the defendant, drove from John F. Kennedy International Airport, New York to Manhattan with some of the currency received that day, and during that drive, Joseph Lipson gave some of the currency to ANTHONY M. McDONALD, JR., the defendant.

j) On or about May 3, 1990, FARHAD BAKHTIAR-BAKHTIARI, the defendant, caused a wire transfer of $250,000.00 from Banque Indosuez, Geneva, Switzerland and to Banque Indosuez, Manhattan, payable at Citibank, 399 Park Avenue, Manhattan.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

12. On or about January 16, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, having devised and intending to devise a scheme and artifice to defraud and to obtain money from the Bank of New York by means of false and fraudulent pretenses, representations and promises, in that they devised a scheme causing the bank to issue an official Bank of New York check 158266, dated February 22, 1990, payable to "Cr Swiss Bank of Geneva for A/C A&B Investment Advisory," in the sum of $232,831.52, that represented unclaimed interest on deposit with the Bank of New York which was owed to bondholders of the Alaska State Housing Finance Corporation and to which the defendants were not entitled, unlawfully, wilfully and knowingly did transmit and caused to be transmitted by means of wire communications in interstate commerce various signals and sounds, namely, a

telephone call between New Jersey and New York, from Joseph Lipson to ANTHONY M. McDONALD, JR., the defendant, for the purpose of executing such scheme and artifice.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT THREE

The Grand Jury further charges:

13. From in or about December 1989, up to and including on or about March 8, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, unlawfully, wilfully, and knowingly did execute attempt to execute a scheme and artifice to defraud and to obtain moneys, funds, credits, assets, securities and property owned by and under the custody of a federally insured financial institution, namely, the Bank of New York, New York, New York, by means of false and fraudulent pretenses and representations, in that they deposited into an account at Credit Suisse, Geneva, Switzerland, an official Bank of New York check 158266, dated February 22, 1990, payable to "Cr Swiss Bank of Geneva for A/C A&B Investment Advisory," in the sum of $232,831.52, that represented unclaimed interest on deposit with the Bank of New York and owed to bondholders of the Alaska State Housing Finance Corporation, to which the defendants were not entitled.

(Title 18, United States Code, Sections 1344 and 2.)

COUNT FOUR

The Grand Jury further charges:

14. From on or about February 22, 1990, up to and including on or about February 26, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and

ANTHONY M. McDONALD, JR., the defendants, unlawfully, willfully and knowingly did transport, transmit, and transfer in interstate and foreign commerce, namely, from Manhattan to Switzerland, security and money of a value of more than $5,000, namely an official Bank of New York check 158266, dated February 22, 1990, payable to "Cr Swiss Bank of Geneva for A/C A&B Investment Advisory," in the amount of $232,831.52, knowing the same to have been stolen, converted and taken by fraud.

(Title 18, United States Code, Section 2314 and 2.)

COUNT FIVE

The Grand Jury further charges:

15. From on or about February 26, 1990, through on or about March 1, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, unlawfully, willfully and knowingly did engage in a monetary transaction in criminally derived property greater than $10,000, in that they deposited an official Bank of New York check 158266, dated February 22, 1990, payable to "Cr Swiss Bank of Geneva for A/C A&B Investment Advisory," in the amount of $232,831.52, into an account at Credit Suisse, Geneva, Switzerland, and then transferred the cash proceeds, minus a commission, back to the United States, and said property derived from specified unlawful activity, namely, the crimes charged in Counts Two, Three and Four.

(Title 18, United States Code, Section 1957 and 2.)

COUNT SIX

The Grand Jury further charges:

16. On or about March 8, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and

ANTHONY M. McDONALD, JR., the defendants, unlawfully, willfully and knowingly did transport, transmit and transfer and attempt to transport, transmit and transfer, monetary instruments and funds, namely a large sum of United States currency, to a place in the United States, namely, Manhattan, from or through a place outside the United States, namely, Switzerland, knowing that the monetary instrument and funds involved in the transportation represented the proceeds of some form of unlawful activity, and knowing that such transportation was designed in whole and in part to conceal and disguise the nature, location, source, ownership and the control of the proceeds of specified unlawful activity, namely, the crimes charged in Counts Two, Three and Four.

(Title 18, United States Code, Section 1956(a)(2)(B) and 2.)

COUNT SEVEN

The Grand Jury further charges:

17. On or about March 19, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, having devised and intending to devise a scheme and artifice to defraud and to obtain money from Security Pacific National Bank and the Security Pacific State Bank, California, by means of false and fraudulent pretenses, representations and promises, in that they devised a scheme to cause the Security Pacific National Bank and the Security Pacific State Bank, California, to honor counterfeit and forged checks, including two counterfeit and forged checks drawn on the account of Shearson Lehman Hutton at Security Pacific State Bank, in cooperation with Security Pacific National Bank, namely (1) check number 00532 12209, dated March 30, 1990, payable to World Curtain Corp., in the sum of $474,000.00, and (2) check number 00532 12213, dated April 2, 1990, payable to World Curtain Corp., in the sum of $437,000.00, unlawfully, wilfully and knowingly did transmit and caused to be transmitted by means of wire communications in

interstate commerce various signals and sounds, namely, a telephone call between New Jersey and New York, from Joseph Lipson to ANTHONY M. McDONALD, JR., the defendant, for the purpose of executing such scheme and artifice.

(Title 18, United States Code, Section 1343 and 2.)

COUNT EIGHT

The Grand Jury further charges:

18. From in or about March 1990, up to and including in or about May 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, unlawfully, wilfully and knowingly did execute a scheme and artifice to defraud and to obtain moneys, funds, credits, assets, securities and property owned by and under the custody and control of federally insured financial institutions, namely, the Security Pacific National Bank and the Security Pacific State Bank, California, by means of false and fraudulent pretenses, representations and promises, in that they deposited two counterfeit and forged checks drawn on the account of Shearson Lehman Hutton at Security Pacific State Bank, in cooperation with Security Pacific National Bank, namely (1) check number 00532 12209, dated March 30, 1990, payable to World Curtain Corp., in the sum of $474,000.00, and (2) check number 00532 12213, dated April 2, 1990, payable to World Curtain Corp., in the sum of $437,000.00, and sought to deposit additional such counterfeit and forged checks.

(Title 18, United States Code, Sections 1344 and 2.)

COUNT NINE

The Grand Jury further charges:

19. From on or about April 3, 1990, to in or about May 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, knowingly, unlawfully and wilfully, did make, utter and possess counterfeit securities of an organization, namely counterfeit and forged checks drawn on the account of Shearson Lehman Hutton at Security Pacific State Bank, in cooperation with Security Pacific National Bank, including (1) check number 00532 12209, dated March 30, 1990, payable to World Curtain Corp., in the sum of $474,000.00, and (2) check number 00532 12213, dated April 2, 1990, payable to World Curtain Corp., in the sum of $437,000.00, with the intent to deceive another person or organization.

(Title 18, United States Code, Section 513(a) and 2.)

COUNT TEN

The Grand Jury further charges:

20. On or about April 3, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, unlawfully, wilfully and knowingly, did transport in interstate and foreign commerce, namely, from Manhattan to Switzerland, falsely made, forged, altered and counterfeited securities and money of a value of more than $5,000, namely counterfeit and forged checks drawn on the account of Shearson Lehman Hutton at Security Pacific State Bank, in cooperation with Security Pacific National Bank, including (1) check number 00532 12209, dated March 30, 1990, payable to World Curtain Corp., in the sum of $474,000.00, and (2) check number 00532 12213, dated April 2, 1990, payable to World Curtain Corp., in the sum of $437,000.00, knowing the same to have been falsely made, forged, altered and counterfeited.

(Title 18, United States Code, Section 2314 and 2.)

COUNT ELEVEN

The Grand Jury further charges:

21. In or about April 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, unlawfully, wilfully and knowingly, did transport, transmit and transfer, monetary instruments and funds, namely, a large sum of United States currency, to a place in the United States, namely, John F. Kennedy International Airport, and a portion of that currency into Manhattan, from or through a place outside the United States, namely, Switzerland, knowing that the monetary instrument and funds involved in the transportation represented the proceeds of some form of unlawful activity, and knowing that such transportation was designed in whole and in part to conceal and disguise the nature, location, source, ownership and the control of the proceeds of specified unlawful activity, namely, the crimes charged in Counts Seven, Eight, Nine and Ten.

(Title 18, United States Code, Section 1956 (a)(2)(B) and 2.)

COUNT TWELVE

The Grand Jury further charges:

22. On or about May 3, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI and ANTHONY M. McDONALD, JR., the defendants, knowing that the property involved in financial a transaction, namely, a $250,000 wire transfer from Switzerland to Manhattan, represented the proceeds of some form of unlawful activity, unlawfully, wilfully and knowingly, did conduct and attempt to conduct said financial transaction, which in fact involved the proceeds of specified unlawful activity, namely, the crimes charged in Counts Seven, Eight, Nine and Ten, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source,

ownership and control of the proceeds of the specified unlawful activity.

(Title 18, United States Code, Section 1956(a)(1)(B) and 2.)

COUNT THIRTEEN

The Grand Jury further charges:

23. On or about May 3, 1990, in the Southern District of New York and elsewhere, FARHAD BAKHTIAR-BAKHTIARI, the defendant, unlawfully, wilfully and knowingly, did engage in a monetary transaction in criminally derived property greater than $10,000, namely a wire transfer of $250,000 from Switzerland to Manhattan, and derived from specified unlawful activity, namely the crimes charged in Counts Seven, Eight, Nine and Ten.

(Title 18, United States Code, Section 1957 and 2.)

FOREPERSON

OTTO G. OBERMAIER
UNITED STATES ATTORNEY

APPENDIX B—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 17, 1993, DENYING PETITIONER'S APPEAL

United State Court Of Appeals

FOR THE SECOND CIRCUIT

NOS. 1239, 1240—August Term, 1992
(Argued March 31, 1993 Decided May 17, 1993)
Docket Nos. 92-1666, -1673

UNITED STATES OF AMERICA,

Appellee,

- v. -

FARHAD BAKHTIAR and ANTHONY M. McDONALD,

Defendants-Appellants.

Before:

OAKES, PIERCE and PRATT,

Circuit Judges.

Appeal from convictions entered in the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, on charges of conspiracy, bank fraud, wire fraud, money laundering and other offenses arising from two schemes to defraud banks. Both appellants raise a due process challenge based on the government's loss of evidence; appellant Bakhtiar argues that his

trial should have been severed because taped statements of McDonald's, admitted under the hearsay exception for statements against penal interest, would have been inadmissible against him.

Affirmed.

HOWARD R. HAWKINS, JR., New York, NY (Curtis L. Sykes, Richard A. McGuirk, Cadwalader, Wichersham & Taft, of counsel). *for Defendant-Appellant Farhad Bakhitiar.*

JAMES T. MORIARTY, New York, NY, *for Defendant-Appellant Anthony McDonald.*

STEVEN M. WITZEL, Assistant United States Attorney for the Southern District of New York, New York, NY (Roger S. Hayes, United States Attorney, Andrew C. McCarthy, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Farhad Bakhtiar and Anthony McDonald appeal from their convictions on charges of conspiracy, bank fraud, wire fraud, money laundering, illegal monetary transactions using the proceeds of criminal activity, and possession and transportation of forged and counterfeit checks, violations of, respectively, 18 U.S.C. §§ 371, 1344, 1343, 1956(a)(2)(B), 1957, 513(a), and 2314 (1988 and Supp. III 1991). The convictions were entered following a 13-day jury trial in the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*. Bakhtiar and McDonald argue that the government's loss of certain pieces of evidence deprived them of a fair trial; that the introduction of duplicates of the counterfeit

checks violated the best evidence rule and deprived them of a fair trial; that the jury did not receive adequate instructions on conspiracy or on Bakhtiar's good faith defense; and that the evidence was insufficient to support a conviction. In addition, Bakhtiar argues that his trial should have been severed from McDonald's because taped statements by McDonald should not have been admitted against him. McDonald also appeals the district court's refusal to grant a 2-level reduction in his sentence on the ground that he was a minor participant in the scheme (Bakhtiar was granted such a reduction). We affirm.

1. FACTUAL BACKGROUND

Bakhtiar, an Iranian citizen very well-connected to the pre-Revolutionary government,[1] was the principal of two Geneva, Switzerland businesses, a brokerage house called First Securities, S.A. ("First Securities") and a consulting firm called A & B Investment Advisory ("A & B"). He also served as the managing director of a large Italian bank in Geneva. McDonald was the first Executive Director of the Commodities Futures Trading Commission ("CFTC").

The charges stemmed from the defendants' involvement in separate schemes to defraud two banks. In the first, the Bank of New York ("BNY") scheme, Bakhtiar and McDonald, together with the conceded masterminds of both schemes, Joseph Conetta, Joseph Lipson and Joseph Ruffalo, defrauded the BNY of $232,831.52 in unclaimed interest payments due to escheat to the State of New York. According to the government's brief, BNY annually collects approximately $36 billion dollars in interest and dividends for its custodial accounts. Because of trading inconsistencies and

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[1] Bakhtiar's cousin, Shaptour Bakhtiar, was the last prime minister of Iran before the Islamic Revolution. Another relative was married to the Shah.

allocation problems, certain of these funds are not claimed. The bank deposits these funds into a separate account. Funds remaining unclaimed for three years (approximately $20 million per year) by statute escheat to the State of New York.

In the summer of 1989, Lipson, a commodities trader, was approached by Conetta and Ruffalo with a scheme to obtain some of these funds. Ruffalo had a contact at BNY with access to the accounts, but the conspirators needed to find an entity, such as a bank or a brokerage company, to make the fraudulent claim on the escheated funds. For help in finding such an entity, Lipson contracted McDonald, whom he knew from McDonald's days at the CFTC, and McDonald in turn contacted Bakhtiar. Bakhtiar advised McDonald and Lipson to open a fictitious account at First Securities, and provided information, including a Credit Suisse affiliation, enabling the conspirators to route a claim for the funds through Bakhtiar's consulting firm, A & B. The phony First Securities account was in the name of "JJJ Trading" (which allegedly stands for the "Three Joes"—Conetta, Lipson, and Ruffalo). Using the information provided by Bakhtiar, Ruffalo and Conetta completed a claim form, dated February 7, 1990, requesting $232,831.52 in unclaimed interest on behalf of A & B. Ruffalo gave Conetta a BNY check for the funds, payable to A & B, and mailed the check to Bakhtiar's attention at A & B. Bakhtiar endorsed the check three days later. Bakhtiar's sister-in-law, Pouran Sheikhan, then flew from Switzerland to New York to deliver the New York conspirator's share of the cash, which was variously said to amount to $160,000, $170,000, or $200,000 (she declared $209,000 in entering the country). Lipson and Conetta met Sheikhan at the airport, and McDonald used his American Express card to guarantee her hotel reservation in New York.

Ruffalo's contact at BNY was discharged or laid off shortly after the success of the first scam. However, Ruffalo had a new contact with access to checks at a financial institution and to a printer capable

of counterfeiting checks. He called Conetta and suggested that they once again contact Lipson, McDonald and Bakhtiar to set up a plan. This led to the second scheme to defraud the Security Pacific National Bank ("Security Pacific"), involving counterfeit checks drawn on Shearson Lehman Hutton ("Shearson") accounts at Security Pacific's La Jolla, California branch. The conspirators copied unused check numbers for the Shearson account and had counterfeit copies of these checks drawn up. The counterfeited checks were made payable to various fictitious companies in the Middle East, including the "World Curtain Corporation," "Crown Point," and "Gulf Power." Conetta and Ruffalo mailed the first two checks, for $474,000 and $437,000, both payable to World Curtain, to Bakhtiar at First Securities; Bakhtiar had the checks deposited at the Banque de l'Orient et d'Outre Mer ("Banorabe") in Dubai, United Arab Emirates ("U.A.E."). The total from these two checks of $911,000 was credited to an account at Banorabe Dubai in the name of Mohamad Afif Diab; $711,000 was wire transferred from that account to Banorabe Geneva for the benefit of Bakhtiar's friend, Ahmad Ataer Al Agaby, and $140,000 to Banorabe London for the benefit of one Osama Kamaluddin Rukn. Four additional checks drawn on Shearson's Security Pacific accounts, made out to Crown Point and Gulf Flower and totalling $1,579,000, were found in the possession of Al Agaby when he was arrested in Egypt for the fraud against the Bubai bank. The Middle Eastern conspirators were tried in Dubai.[2] Bakhtiar once again enlisted Sheikhan to fly $300,000 in

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[2] The status of the proceedings in Dubai is not clear from our record. According to a letter brief in the government sent to the district court, it appeals that Al Agaby, Diab, and Rukn were acquitted at trial; that the acquittal was reversed on appeal; and that at the time of Bakhtiar's and McDonald's trial, this decision had been appealed and further hearings were expected.

Because the proceedings at Dubai began before any conspirators had been identified in this country, the government turned over the original World Curtain

cash to New York, and he also transferred $250,000 to the New York conspirators by wire. It is claimed that he kept a larger portion of the proceeds in the second scheme because of the greater risk involved.

All told, it appears that McDonald gained 20,000 from the BNY scheme but only $1,000 from the Security Pacific scheme. McDonald attributes this small take in the second scheme to having a minor role; the government claims that the conspirators were caught before McDonald's full share was distributed. Though no explicit finding on this subject was made by the district court, judging by the amounts returned to the United States, it can be inferred that Bakhtiar gained between $20,000 and $40,000 from the first fraud, and roughly $160,000 from the second.

Some seven moths later, Conetta, Lipson and Ruffalo suggested a new scheme to defraud Drexel, Burnham, Lambert, Inc. ("Drexel") of unclaimed interest payments. At roughly the same time that the Drexel scheme was being developed, Lipson, Conetta and Ruffalo were arrested for their part in an unrelated scheme to steal United States Treasury bonds. All three pleaded guilty to changes related to that scheme, and the BNY and Security Pacific schemes were considered as relevant conduct in their sentencing hearings. None of the three, however, was actually charged with any crime associated with the BNY or Security Pacific frauds. Rather, in exchange for leniency, Lipson and Conetta served as the government's key witnesses against Bakhtiar and McDonald.

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checks to Dubai authorities for use in their case. The checks made out to the other two companies were seized by Egyptian authorities and sent directly to Dubai. The authorities in Dubai made copies of all the checks for use in the trial of McDonald and Bakhtiar, but, despite requests from the State Department, the Federal Bureau of Investigation, and Security Pacific's representative in Dubai, the originals could not be obtained since the Dubai proceedings had not been completed.

As part of Lipson's cooperation agreement, he also wore a microphone in a number of meetings with McDonald's related to the Drexel scheme and other matters. As many as 75 tapes were made of Lipson and other involved in these schemes. However the Secret Service, which was in charge of the investigation, evidently lost its tapes of five of these conversations. As a result of the loss of this evidence, the government dropped its charges against Bakhtiar and McDonald related to the Drexel scheme. However, Bakhtiar and McDonald claim that the still available brief Secret Service summaries of these tapes indicate that they would have been useful as impeachment material in their trials for the crimes associated with the BNY and Security Pacific frauds as well, in that the tapes allegedly demonstrate their reluctance to engage in criminal activity. They claim that the Secret Service has a weak chain-of-evidence procedures that contributed to the loss of evidence. Furthermore, they note that weak procedures provide the potential for selective destruction of unfavorable evidence, and argue that the Secret Service was so negligent in its routine handling of these tapes that the losses should be deemed willful, or in "bad faith," in the terms of the case law. However, the district court concluded that there was no reason to believe the defendants' claims that the missing evidence would have been exculpatory.

This case has twice before reached this court. On the first occasion, the government appealed Judge Stanton's suppression of McDonald's confession as involuntary, following a hearing in which it appeared that the confession was obtained by promising McDonald that he could rerun home to his very ill parents much more quickly if he cooperated. The Court of Appeals remanded for further findings, *United States v. Bakhtiar*, 962 F.2d 2 (2nd Cir. 1992) (table), and on remand Judge Stanton again ruled that the confession should be suppressed. After a 13-day trial featuring the testimony of Lipson and Conetta, a jury found both Bakhtiar and McDonald guilty of all charges. Following trial, Judge Stanton released the defendants on bail pending sentencing. The government

appealed the bail decision with respect to Bakhtiar, who continued to reside abroad, and this court affirmed. *United States v. Bakhtiar-Bakhtiari*, No. 92-1237 (2d Cir. May 5, 1992). Judge Stanton sentenced both Bakhtiar and McDonald to the minimum possible terms under the guidelines.[3] Both defendants were released on bail pending the outcome of this appeal.

II. DISCUSSION

A. Missing evidence as Brady or 18 U.S.C. § 3500 violation.

Bakhtiar and McDonald allege that the government's loss of a number of items violated the requirement of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, that the prosecution provide the defense with material exculpatory information.[4] While we agree that the government was sloppy in its handling of this evidence, it

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[3] Both defendants had a base offense level of 25 and a criminal history category of I; Bakhtiar received a 2-level reduction for being a minor participant. Bakhtiar received 46 months' imprisonment and 3 years supervised release; McDonald received 57 months' imprisonment and 3 years supervised release. In addition, Bakhtiar was ordered to pay restitution of $184,000, a fine of $223,000, and $650 in assessments. McDonald, who had virtually no assets, was ordered to pay $600 in assessments.

[4] Both defendants also argue that the failure to provide the tapes violated 18 U.S.C. § 3500 (1988), governing discovery of "statements" of government witnesses. Essentially § 3500 bars discovery until the witness has testified on direct examination in the case, and limits discovery of such statements to material relating to the subject matter of the testimony; it operates as a limitation on the general discovery rules set forth in Fed. R. Crim. P. 16. rule 16 requires the prosection to make available any requested material evidence "within the possession, custody or control of the government," Fed. R. Crim. P. 16(a)(1)(A) (statements of defendant); 16(a)(1)(B) (defendant's prior record); 16 (a)(1)(C) (documents and tangible objects), 16(a)(1)(D) (reports of examinations and tests), subject to the limits imposed by 18 U.S.C. § 3500, Fed. R. Crim. P. 16(a)(2).

appears that the missing material would have been of little or no use to the defense. Consequently, the loss did not deprive either defendant of a fair trial.

The claims arise from:

(1) the disappearance of five tapes of six conversations between Lipson and Charles Chitty, a cooperating informant, allegedly due to the Secret Services' inadequate chain-of-custody procedures. According to the Secret Service logs of these tapes, the first two, on January 3, 1991, concerned the Treasury bond scheme, in which McDonald and Bakhtiar were not involved; the third, on January 8, set up a meeting; and the fourth and fifth, on January 9, concerned the Drexel scheme. The summary of the fourth says, "Lipson want[s] to do entire deal through CI [Chitty]," from which Bakhtiar infers that Lipson did not plan to do the deal with him. The sixth conversation, on January 24, 1991, was not summarized.

(2) The prosecution's failure to inform the defendants that Lipson has made statements indicating that Bakhtiar was not involved in the Drexel scheme (apparently this is a reference to the January 9 conversation in which Lipson said he wanted to do the deal through Chitty; as the defense was provided with a copy of the log, this is essentially a repetition of the claim that the lost tape was not furnished).

(3) The disappearance of a currency transaction form from Sheikhan's second trip, on which Sheikhan told customs officials that she had brought $300,000 in cash into the country to buy real estate; Bakhtiar alleges that this form would have buttressed the claim that the money was in fact brought in for this purpose rather than to pay off the conspirators for their roles in the Security Pacific scheme.

(4) The loss of a tape of an April 1, 1991 meeting concerning the Drexel scheme, at which, according to Lipson's trial testimony, McDonald accused another conspirator of being a "cheap crook,"

or words to that effect, for seeking a bribe from Bakhtiar; and the "concealment" of a Secret Service memo indicating that no tape had been made of this conversation because the tape recorder had malfunctioned. Allegedly this tape would have been useful to impeach Lipson's testimony that Bakhtiar was willing to engage in criminal activity. The secret service log was "concealed" in that, because the government had not initially charged Bakhtiar and McDonald in the Drexel scheme, the government did not at first produce the log in response to questions about what relevant evidence it possessed.

(5) The failure to produce the original Security Pacific counterfeit checks.

(6) The production of only one set of notes of a Feb. 7, 1991 meeting between Conetta and federal agents, following Conetta's arrest, despite Conetta's testimony that more than one agency had taken notes of the meeting (no agent remembers any other agent taking notes and the defense was given the opportunity to question the agents).

(7) A 45-second gap in tape of a March 29, 1991 conversation between Elison, another conspirator, and Bakhtiar, which the government explained at first as the result of Elison having knocked the plug out of the tape recorder, and later as the result of a failure to turn the tape over promptly. The government introduced only material before the gap.

1. Legal standard

Bakhtiar and McDonald claim that the missing evidence violated *Brady's* requirement that the prosection disclose material evidence. The *Brady* Court held that the suppression by the prosection of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

> The principle [underlying this rule] . . . is not punishment of society for misdeeds or a prosecutor but avoidance of an unfair trail to the accused.

373 U.S. at 87.

However, although Bakhtiar and McDonald cast this case as one of failure to disclose exculpatory material, like *Brady* and *United States v. Bagley*, 473 U.S. 667 (1985), it really involves the loss or destruction of evidence. This situation poses problems slightly different from *Brady* and *Bagley*: any error here cannot be cured by ordering a new trail including the missing evidence, and it is more difficult to determine whether the lost evidence was material to the case.

Some of the case law suggests that defendants can be deprived of a fair trial only if the government acted in bad faith. *E.g. Arizona v. Youngblood*, 488 U.S. 51 (1988) (negligent destruction of semen samples did not deprive the defendant of a fair trial). *Youngblood*, following *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) (failure to preserve drunk drivers' breath samples for retesting) limits bad faith destruction to situations in which the government knew of the exculpatory value of the evidence when it was destroyed. The defendants argue that it is also bad faith for a government agency to provide no reliable system for the preservation of evidence, citing *United States v. Bryant*, 439, F2d 642 (D.C. Cir. 1971). As Judge Skelly Wright argued in *Bryant*, the only way to protect *Brady* material before the defendant requests it is to require the government to safeguard potentially exculpatory evidence. 439 F.2d at 650-53.

Bryant may still have validity after *Youngblood*, since the evidence at issue in Youngblood was a sort only "potentially" exculpatory—it had never been tested for determination of its exculpatory or inculpatory value. By contrast, the evidence we have here did not need to be tested to determine its value; it is possible in

this case that government agents recognized some exculpatory value in the tapes and destroyed them or that government agents made use of the lost evidence before it was lost. However, we need not reach that issue. Even if Bakhtiar and McDonald could establish that the Secret Service procedures were inherently deficient under the *Bryant* standard, they have failed to show something far more important: that any of these losses prejudiced their defense. See *United States v. Grammatikos*, 633 F.2d 1013 (2nd Cir. 1980). As the *Grammatikos* court held,

> the appropriateness and extent of sanctions . . . depends upon a case-by-case assessment of the government's culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the government's untainted proof.

633 F.2d at 1019-20, *Accord, United States v. Morgenstern*, 933 F.2d 1108, 1115-16 (2nd Cir. 1991) (loss of evidence through "unthinking negligence of gross magnitude"—loaning materials to complaining witnesses—did not substantially prejudice defense), *cert denied*, 112 S. Ct. 1188 (1992); *United States v. Maldonado-Rivera*, 922 F.2d 934, 954-55 (2nd Cir. 1990) (loss inadvertent and materials available in other forms), *cert. denied*, 111 S. Ct. 2811, and *cert. denied*, 111 S. Ct. 2858, and *cert. denied*, 111 S. Ct. 2858 (1991); *United States v. Rastelli*, 870 F.2d 822, 833-34 (2d Cir.) (no prejudice; government lost tapes of three conversations through negligence, not bad faith), *cert. denied*, 493 U.S. 982 (1989); *see also United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978) (where documents destroyed deliberately, government "bear[s] the heavy burden of demonstrating that no prejudice resulted").

None of the missing items meets this standard. None of the missing tapes, for example, dealt with the BNY or the Security

Pacific scheme. At best, the missing tapes might have suggested that Bakhtiar was not involved in the Drexel scheme, that he was unwilling to do something allegedly dishonest on one other occasion (refusing to give someone money upfront for a gold trade, which McDonald called, on tape, "Farhad's legitimate deal"), and that this evidence indicated that he was an honest man. Even if the tapes were admissible to prove that Bakhtiar would have behaved honestly when the BNY and Security Pacific schemes were proposed—and even if the material were admissible for this purpose, which the government disputes—it is very hard to see how these arguments would have helped. The jury was presented with ample evidence that Bakhtiar had participated in the schemes and received large sums of money as a result; it would likely have been skeptical about drawing the inference that Bakhtiar's lack of participation in one scheme demonstrated that he was too honest a man to have participated in another. Indeed, the available evidence suggests that the tapes might have been more inculpatory than exculpatory, so that Bakhtiar may have been better off raising these arguments to the jury on the bases of the summaries of the tapes and the suggestion that the loss of the tapes was suspicious.

Nor would the tapes have been very useful as impeachment evidence, even if they said what Bakhtiar and McDonald claim. The alleged impeachment value is to demonstrate that Lipson thought Bakhtiar would not conduct illegal activity; the statements seized upon must be twisted to reach this conclusion, and at best suggest that Bakhtiar was not interested in particular deals because of their high risk. In sum, while the prosecution handled the evidence sloppily, the affected evidence, even assuming the defense characterizes it accurately, was not material to these charges.

While there may be circumstances in which government sanctions for negligent loss of evidence are appropriate, per *Bryant*, this is not that case. Sanctions should be tailored to redress for any resulting harm to the defendant, and perhaps to spur the government

to handle things more carefully; they should not bar the government from proceeding against the same defendants on other charges, unless the missing evidence is material to those charges. In this case, the defendants benefited from the prosecution's loss of evidence when the charges related to the Drexel scheme were dropped.

B. Bakhtiar's severance motion.

Bakhtiar also argues that his trial should have been severed from McDonald's because statements were admitted in the joint trial which would not have been admissible against him in a separate trial, and which unduly prejudiced his right to a fair trial. The relevant statements were made in taped conversations between McDonald and Lipson after Bakhtiar's arrest, in which McDonald and Lipson tried to concoct a cover story to explain why Bakhtiar had been sending them so much money. The statements were admitted under the hearsay exception for statements against penal interest Fed. R. Evid. 804(b)(3). There are two requirements under Rule 804(b)(3) for admissibility of statements against penal interest: that the declarant be unavailable and that the statement "at the time of its making... so far tended to subject the declarant to civil or criminal liability... that a reasonable person in the defendant's position would not have made the statement unless believing it to be true." Corroboration is also required if the statement is offered to exculpate the accused, *id.*: here, of course, it was offered by the government.

The parties agree on the first point, that McDonald was unavailable as a witness on the ground of privilege. Fed. R. Evid. 804(a)(1); *United States v. Beltempo*, 675 F.2d 472, 479 (2d Cir.), *cert. denied*, 457 U.S. 1135 (1982), *citing United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978) (codefendant who elects not to take stand is unavailable as witness even without formal claim of privilege). They disagree, however, on the second. Bakhtiar argues that when McDonald made the statement, he had suspicions that Lipson was a government agent, and that McDonald's statements were not reliable because McDonald may have been trying to

inculpate Bakhtiar and to minimize his own role. However, the statements do not appear to be of this sort. While McDonald once checked Lipson for a wire and sought assurances that he was not cooperating, he appears to have satisfied himself before talking. More significantly, the statements incriminate McDonald, as well as Bakhtiar, rather than attempting to shift responsibility from McDonald to Bakhtiar. *Cf. United States v. Katsougrakis*, 715 F.2d 769, 774-75 (2d Cir. 1983) (discussing trustworthiness of statements against penal interest which also implicate another), *cert. denied*, 464 U.S. 1040 1984).

Bakhtiar also argues that even if the statements fell within the penal interest exception to the hearsay rule, they do not meet the independent requirements of the Confrontation Clause. Generally speaking, there is no confrontation clause problem if the defendant is unavailable and the statement "bears adequate 'indicia of reliability,'" *Ohio v Roberts*, 448 U.S. 56, 66 (1980). These indicia of reliability may be found either by determining that the hearsay exception is "firmly rooted,"[5] or by independent evaluation of the surrounding circumstances.

We have previously held that the penal interest exception is firmly rooted. *Katsougrakis*, 715 F.2d at 776. Some recent cases cast some doubt on this conclusion, however, and the Supreme Court has not addressed the question. *See United States v. Flores*, 985 F.2d 770 (5th Cir. 1993) (exception for statements against penal interest not firmly rooted); *Olson v. Green*, 668 F.2d 421, 428 (8th Cir.) (custodial statements implicating third party do not fall within firmly

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[5] The Supreme Court uses the term "firmly rooted" to descibe those hearsay exceptions which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.'" 448 U.S. at 66. The Court has explained that "[t]his reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values.'" *Id.* (footnotes and citations omitted).

rooted exception), *cert. denied.* 456 U.S. 1009 (1982). ***But see*** *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir.) (exception firmly rooted as to statements not made to limit declarant's exposure), *cert. denied*, 112 S.Ct. 321 (1991); *United States v. Seeley* 892 F.2d 1, 2 (1st Cir. 1989) *citing Katsougrakis*, 715 F.2d at 1766 (exemption "would seem to be 'firmly rooted.'"). The *Flores* Court concluded that the exception for declarations against penal interest is not firmly rooted because it historically has been quite controversial, because it has only recently been added to the Federal Rules of Evidence, and because the Supreme Court has indicated that statements against penal interest which also inculpate a third party are often suspect. *Flores*, 985 F.2d at 777-80.

In any event, we need not meet the "firmly rooted" question head on. The statements in this particular instance bore adequate independent indicia of reliability meeting the "'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause... drawn from the totality of the circumstances [surrounding] the making of the statement and [rendering] the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). Those indicia of reliability, in this case, as in so many cases of statements against penal interest, are based in the general understanding that people do not ordinarily make statements damaging to themselves unless they are true. Bakhtiar suggests that McDonald's statements were unreliable because he suspected that Lipson was an informer and that his statements were therefore made in an attempt to minimize his own culpability, to shift blame to Bakhtiar, or to curry favor with authorities. Such statements, we agree, do not bear the same indicia of reliability as the usual statement exposing a declarant to unpleasant consequences, such as criminal liability. This is because in effect, the declarant attempting to shift blame or curry favor no longer believes that at least that portion of the statement which is self-serving is against his penal interest.

However, a review of the transcripts reveals that Bakhtiar's characterization of the conversations between Lipson and McDonald is not apt. The portion of McDonald's statement damaging to Bakhtiar was precisely that portion that was damaging to McDonald—McDonald's effort to come up with a cover story to explain why Bakhtiar had wired money to Lipson and McDonald. Furthermore, in the words of *York*, where "the circumstances surrounding the portion of a declarant's statement inculpating another are such that the court determines that the inculpatory portion of the statement is just as trustworthy as the portion of the statement directly incriminating the declarant, there is no need to excise or sever the inculpatory portion of the statement." 933 F.2d at 1364. *See also United States v. Stratton*, 779 F 2d 820, 830 (2d Cir. 1985) (same), *cert. denied* 476 U.S. 1162, and *cert. denied*, 477 U.S. 906 (1986). While at one point on the tapes McDonald tries out, as a story for Lipson and McDonald to use when questioned by authorities, that he and Lipson did not know much about what was going on, that they did not think anything about the deals looked funny, and that they had contacted Bakhtiar for his assistance because he knew a lot about how business was conducted in Europe, this does not appear to be an attempt to convince Lipson of McDonald's innocence. McDonald's comments elsewhere on the tapes demonstrate that he assumes Lipson knows that he knows more. After examining the statements, and the circumstances in which they were made, we conclude that McDonald could not have been attempting to minimize his exposure by including Bakhtiar in his comments, and that the totality of the circumstances surrounding the making of these statements provide particularized guarantees of their trustworthiness.

In any case, though, if it was error to admit the statements against Bakhtiar, the error was harmless. There was substantial other testimony connecting Bakhtiar to the frauds, in particular the testimony of Lipson and Conetta. In addition, there was substantial

corroborative evidence of Bakhtiar's financial transactions and telephone conversations with the other conspirators.

C. The missing checks and best evidence rule.

Both Bakhtiar and McDonald argue that the government's failure to produce the original counterfeit Security Pacific checks deprived them of a fair trial. Federal Rule of Evidence 1003 permits the use of duplicates, such as photocopies, to prove the contents of a writing "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

The defendants raise no serious questions as to the authenticity of the original or as to the fairness of admitting the duplicates. The duplicates included clear color and black and white photographs and photocopies of the checks. The first set of copies, made by a Shearson employee immediately after the fraud was discovered, was authenticated at trial; the most recent was accompanied by a certificate of authenticity provided by officials at Banorabe Dubai. The defendants do not challenge the fairness of introducing the duplicates as a means of establishing the contents of the writing—the concern of the best evidence rule. Rather, Bakhtiar and McDonald argue that they needed to conduct fingerprint analysis of the checks to demonstrate that they had not handled the checks. They further argue that examination of the originals would have enabled them to rebut the prosecution's claims as to the methods by which the originals were fabricated. However, these arguments were raised for the first time only two weeks before the final trial date. In a hearing before Judge Stanton, the government argued that it ordinarily takes the FBI months to conduct such analysis, and that the late request thus demonstrated that the defendants were not serious about needing fingerprint analysis or other expert analysis of the checks, but simply looking for a way out of the trial. Judge Stanton concluded that the copies were adequate and rejected the claim that the use of duplicates would be unfair to the defense. We agree.

4. McDonald's request for reductions in sentence for minor participant status.

McDonald argues that he should have been granted a two-level reduction for being a minor participant in the frauds. He claims that, contrary to the government's assertions, he was not a middleman, but simply arranged for the first contact between Lipson and Bakhtiar and thereafter was irrelevant. He claims that he received little money for his part in the Security Pacific scheme, and that this demonstrated the insignificance of his position. However, the government presented a range of evidence indicating that, while the conspirators might have been capable of proceeding without McDonald's help, he continued to make phone calls on behalf of the conspiracy. They suggest that he received little money for his role in the second scheme only because the scheme was interrupted before all of the money could be collected. The taped conversations include discussions between Lipson and McDonald in which McDonald suggests ways to cover up the conspiracy. In short, the disagreement is entirely factual. Judge Stanton's review of the facts was careful and his handling of the case a model of fairness; we do not think his resolution of this factual dispute was clearly erroneous. *See United Stares v. Davis*, 967 F.2d 84, 88-89 (2d Cir.) (clearly erroneous standard), *cert. denied*, 113 S.Ct. 356 (1992).

5. Other Issues.

We have considered the defendants' other arguments, and found them to be without merit. In particular, we have closely examined the jury instructions challenged by the defendants, and conclude that Judge Stanton's careful instructions amply informed the jury of the elements necessary to a finding of guilt, and that the objections may have been waived by the defense's failure to renew its objections to the instructions at the charging conference or after the charge was given.

III. CONCLUSION

Accordingly, we affirm the judgments of the district court.

APPENDIX C—LETTER FROM GOVERNMENT, OF DECEMBER 17, 1991 CONCERNING GAP ON TAPE

Letterhead

U.S. Department of Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

December 17, 1991

Curtis L. Sykes, Esq.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, N.Y. 10038

Re: *United States v. Farhad Bakhtiar-Bakhtiari and Anthony M. McDonald, Jr.*,
S1 91 Cr. 782 (LLS)

Dear Mr. Sykes:

This letter responds to your letter of November 18, 1991, concerning the March 29 tape (9:35 a.m.).

You have asked for a detailed explanation concerning the gap on the tape. On page six of the revised transcript provided to counsel on December 11, the gap in the telephone conversation is indicated by "end of side one" and then "side two."

As I previously told you orally, I was told the following by Special Agent Charles Green: During the taping, Agent Green noticed that the tape had stopped, but did not know initially why. He flipped the tape over, believing that such action might again start the recording. Hence, side one and side two. The tape did not start again until Agent

Green realized that the plug was loose. He pushed the plug in and side two commenced.

As best as can be reconstructed, the gap in the conversation was for approximately forty-five seconds. That estimate is very rough. Neither Agent Green nor Mr. Elison can specifically remember the conversation that was not recorded.

I would be happy to work out mutually acceptable language to be inserted on page six of the transcript. Please call me at your earliest convenience.

Sincerely,

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York

By:\Signature
STEVEN M. WITZEL
Assistant United States Attorney
Tel. No.: (212) 791-1946

cc: Fern Schwaber, Esq.

APPENDIX D—LETTER FROM GOVERNMENT, OF MARCH 20, 1992 CONCERNING MISSING TAPES

Letterhead

U.S. Department of Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

March 20. 1992
CORRECTED AS OF MARCH 23, 1992

Howard Hawkins, Esq.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New YorK, N.Y. 10038

Fern Schwaber, Esq.
Schwaber & Kafer
35 Worth Street
New York, N.Y. 10013

Re: *United States v. Farhad Bakhtiar-Bakhtiari and Anthony M. McDonald, Jr.*,
S1 91 Cr. 782 (LLS)

Dear Counsel:

Enclosed are revised transcripts for the fourteen tapes previously provided pursuant to Fed. R. Crim. P. 16

On March 9, the Government produced thirty tapes as advance "3500 material". One of the tapes, a January 23, 1991 conversation between CI 1578 and Mr. Lipson, is blank on our copy. Accordingly,

we have enclosed an audible copy of the original in case your tape is also blank. In addition, a January 31, 1991 tape that was labelled Elison and Lipson, should have been labeled as CI 1578 and Lipson.

With respect to Mr. Syke's letter concerning the March 29 tape (9:35 a.m.), after carefully reviewing the original tape, the Government's position is that there is a gap of approximately 45 seconds because the tape had run out on side one and the agent was not able to turn the tape over and start recording on side two for approximately 45 seconds. As previously indicated in my December 17 letter to Mr. Sykes, Special Agent Green noticed during the taping that the tape had stopped, but did not know why. Agent Green initially thought that the plug, located on the floor, had been knocked loose by Mr. Elison. The plug was not out of the socket, but the plug appeared loose to Agent Green. Agent Green did not see Mr. Elison knock the plug loose, but initially believed that was the reason that the tape had stopped. Agent Green noticed at the time that Mr. Elison's shoe was immediately adjacent to the plug socket. Agent Green flipped the tape over, and the recording re-commenced. A review of the original tape shows that the conversation runs out at the end of the tape on the first side, and starts again at the beginning of the second side. This description is somewhat inconsistent with the Government's previous understanding of the "gap", but after review the original tape, I am satisfied that the gap was simply caused because the tape ran out.

The estimate of an approximately 45 second "gap" is Agent Green's and Jim Elison's best recollection of the time that the tape was not running based upon what happened at that time and also based upon a review of the actual taped conversation. Neither Agent Green nor Mr. Elison can specifically remember the conversation that was not recorded.

With respect to the advance "3500 material" in the form of taped conversations, the Government now advises the defendants that in addition to the 30 conversations involving Lipson that were turned

over to counsel on March 9, there appears to be six additional conversations recorded on five tapes, of which the actual tapes were lost by the Secret Service. Report or synopses are available for five of those conversations. For the final tape there is no report; only an entry on an evidence form. After an exhaustive search at Secret Service headquarters for the physical tapes, as well as through reports and other documents, the Government has determined that the following five tapes are missing:

1/3/91	CI 1578 - Lipson	Telephone call
1/3/91	CI 1578 - Lipson	Body recorder
1/8/91	CI 1578 - Lipson	Telephone call
1/9/91	CI 1578 - Lipson	Telephone call*
		* (on same tape)
1/9/91	CI 1578 - Lipson	Telephone call*
1/24/91	CI 1578 - Lipson	Telephone call

As counsel will be able to discern from the reports being turned over with this letter, the first two missing conversations concerned the Rabinowitz bond crime which did not involve the defendants at all. The next three conversations concern the Drexel matter. The last conversation is not synopsized. It is clear that the defendants were not recorded on those tapes. Moreover, although the Government is not conclusively positive because the tapes have been lost, as far as we can ascertain from the synopses of the five conversations, neither defendant's name was even mentioned on the tapes.

Because the five tapes are missing, it is the Government's intention not to elicit the substance of the conversations recorded on those five tapes. Although the tapes are therefore not "3500 material," the United States Attorney's office believes that any missing evidence, even if backup reports exist, is a very serious matter, and we have directed that a total review be conducted to reveal the full extent of the missing evidence and to search for the tapes. In view of this situation, I am immediately turning over all the reports and documents concerning those conversations, and a

photocopy of the evidence bag for the January 24 tape. If any of the tapes are recovered, we will immediately provide them to counsel.

Sincerely,

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York

By:\Signature
STEVEN M. WITZEL
Assistant United States Attorney
Tel. No.: (212) 719-1321

Enclosures

cc: Honorable Louis L. Stanton (w/o enclosures)

APPENDIX E—DECISION AND FINDING OF FACT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, LOUIS L. STANTON JUDGE, ON APRIL 14, 1993 DENYING MOTION TO DISMISS

I was going to receive, I think, from something from the government.

MR. WITZEL: Yes, your Honor. I just need to proof the last changes that were made. It will take two minutes, your Honor.

(Pause)

THE COURT: Thank you.

(Pause)

THE COURT: All right, gentlemen. I am prepared to rule with respect to the motion for acquittal, or striking the testimony of Lipson, et al.

It is fair to say that the performance of the prosecution in this case is open to more criticism than in any case in my experience, in terms of inadequate preparation, carelessness with evidence and with facts, and lack of those senses of professional responsibility and fairness to defendants that used to inspire confidence in the government's presentations. But ineptitude and the failure of independent, principled control over the Secret Service investigators does not amount to bad faith.

Here, most of the shortcomings in the government's production of documents were disclosed by the government itself. Most of the misstatements in its bill of particulars can be attributed to its changing positions with respect to the Drexel scheme, and most of its deliveries of 3500 material, although late in the day, were made within the strict statutory time limits.

On the whole case, the proper inquiry is not how to punish the government, but whether the defendants' right to a fair trial has been so impaired that they should be acquitted or Lipson's testimony stricken.

I have concluded that the prejudice perceived and urged by the defendants is more imaginary than real. It centers on the missing tapes, but neither of the defendants participated in the conversations recorded on them. There is no solid reason to believe the conversations concern the transactions with which the defendants are charged in this case, and Lipson's exculpatory statement to which Mr. Bakhtiar points has been testified to by Mr. Lipson in court.

The hope that there might be more such is speculative, and Mr. Lipson was available and was cross-examined.

There is no showing of any intentional Brady violation. This is not to say that it would not have been better for the tapes to have been kept and supplied, but only that the prejudice

apparent from their loss is not such as to justify striking Lipson's testimony or entering judgment of acquittal.

Accordingly, the motion is denied.

APPENDIX F—DECISION AND FINDING OF FACT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ON APRIL 13, 1993, DENYING MOTION TO DISMISS BASED ON RULE 29, FEDERAL RULES OF CRIMINAL PROCEDURE

Green-recross

A. That's correct.

Q. And where it the Secret Service office?

A. In the World Trade Center.

Q. No. 8 World Trade Center?

A. No. 6.

Q. No. 6.

Q. And the Market Bar is in No. 1 World Trade Center?

A. Yes, bottom of the concourse.

Q. Takes about five minutes to walk from Secret Service over the Market bar, correct?

A. Yes, sir, maximum.

MR. HAWKINS: I have no other questions.

MR. SCHWABER: No questions, your Honor.

THE COURT: Thank you, Mr. Green, you're excused.

MR. WITZEL: Your Honor, the government rests.

MR. HAWKINS: May we approach sidebar?

(At the sidebar)

MR. HAWKINS: Your Honor, we submitted a memorandum of law so I'm only doing this for the record this moment. Defendants move for judgment of acquittal under 29A. In addition to our points made in our memorandum, which is the principal basis of the motion, I would also say in particular once the testimony of Lipson and Conetta were stricken, the essence of all the counts of the indictments fall. And in addition to those points, the defendants submit that there is no evidence of record that any of the monies they were involved with were criminal proceeds of any sorts.

MS. SCHWABER: Nothing to add, your Honor.

THE COURT: The Rule 29 motion, to the extent that it rests on absence of evidence sufficient to go to the jury in the record at present, is denied. Decision is reserved on the motion to dismiss on which the defendants most recent submission was received this morning or perhaps yesterday morning.

MR. HAWKINS: This morning.

THE COURT: Okay. Are you going to have anything more than that? Are there going to be any further submissions on that motion?

MR. WITZEL: We just received defendants papers this morning about 9:45.

THE COURT: I'm just asking whether you're going to have any further submissions.

MR. WITZEL: I think we need to take a further look at them. I think we probably will, your Honor.

APPENDIX G—SECRET SERVICE TELEPHONE INTERCEPT REGULATION

Telephone and Non-Telephone Interceptions

Consensual Interception Evidence Label, SSF 3148 (cassette box) and SSF 3148A (cassette) should be utilized to identify the recording of all consensual interceptions of wire and oral communications. The labels are adhesive backed and are printed with space for all the information necessary to complete the required teletype, and to insure the evidentiary value of the recordings. The cassette box label (SSF 3148) is designed to fit on the top and fold over the end of a 'Phillips' cassette box, see FSO-26 of the Investigative Manual (the following page displays a sample of the SSF 3149 and SSF 3148A).

All consensual tapes will be inventoried on the SSF 1544. At the time the case is closed, consensual tapes may be destroyed locally. Non-judicial cases require permission from the appropriate Headquarters operational division prior to destruction. Judicial cases also require permission from the appropriate operational division and consultation with the U.S. Attorney's Office, prior to destruction. SSF 1544 clearance procedures must be followed when destroying consensual tapes. TAPES SHOULD NEVER BE RE-USED FOR THE RECORDING OF EVIDENCE.

APPENDIX H—LETTER FROM GOVERNMENT OF MARCH 6, 1992 CHARGING DREXEL SCHEME AS PART OF CONSPIRACY CHARGES

Letterhead

U.S. Department of Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

March 6, 1992

The Honorable Louis L. Stanton
United States District Court Judge
Southern District of New York
Room 410
United States Courthouse
New York, N.Y. 10007

Re: *United States v. Farhad Bakhtiar and Anthony McDonald,*
S1 91 Cr. 782 (LLS)

Dear Judge Stanton:

The Government respectfully submits this letter to advise Your Honor and defendants Bakhtiar and McDonald that the Government will seek to introduce certain similar act evidence against Mr. McDonald pursuant to Federal Rule of Evidence 404(b). The Government has previously advised counsel that it was "investigating other suspected 'bad acts' of the defendants" and would in the future provide a "more detailed '404(b)' letter," November 5, 1991, Letter, ¶ 2(b).

The Indictment charges that McDonald acted with others, including co-conspirators Joseph Lipson and Joseph Conetta, to commit financial crimes involving fraudulent checks representing unclaimed interest (Bank of New York scheme) and counterfeited checks (Shearson Lehman scheme), beginning in December 1989. The government anticipates that McDonald's defense will be lack of knowledge and intent, i.e., that he did not know of the fraudulent nature of the checks. If McDOnald presents such a defense (or any other defense that opens the door to similar act evidence), the Government will seek to elicit proof of the following:

1. In December 1989, or early January 1990, Joseph Lipson gave Anthony McDonald two checks that Anthony McDonald knew had been wither stolen or counterfeited.

2. The checks were drawn on the account of Doctors Hospital, 170 East End Avenue, New York, N.Y. , at the Manufacturers Trust Company, payable to First International Discount Corp. and N.D.M. Service Corp. in the amounts of $67,765.00 and $57,705.00, respectively.

3. McDonald arranged to have the checks cashed through Norman Mosesson, the owner of the corporate payees. One check was successfully cashed, the other was not.

4. The two checks that Anthony McDonald presented had been stolen in blank from Doctors Hospital. The checks had unauthorized payees filled in, and the signatures forged.

Yesterday, the Government provided discovery on this similar act, including a lab report for the check that was deposited, bate stamped 902901 and 902904.

Of course, the Government does not know the precise nature of the defense McDonald will present. Consequently, the Government will not mention this similar act in its opening. However, should McDonald raise any defense—such as lack of knowledge or intent—that opens the door to such evidence, the Government will seek to introduce the similar act evidence described above against McDonald. Of course, because the similar act does not involve Bakhtiar in any way, the Government will not offer the evidence against him.

The Government also respectfully submits this letter to provide notice and additional discovery concerning an unclaimed interest and dividend scheme, which is part of the same conspiracy charged, and will be introduced in direct evidence at trial. Although not specifically charged as an overt act in the conspiracy, this scheme was part of the charged conspiracy in that it involved the same participants, during the same time period, and with the same goal as the charged conspiracy. Of course, the indictment need not allege every circumstance of a conspiracy, as long as the charged conspiracy is sufficiently identified. *See United States v. Kahan*, 572 F.2d 923, 935 (2d Cir.), *cert. denied*, 439 U.S. 832 (1978).

In December 1990 to January 1991, Joseph Lipson spoke with Anthony McDonald and Farhad Bakhtiar, and asked them if they would be interested in participating in another scheme to fraudulently withdraw unclaimed interest and dividends, this time from Drexel Burnham. Both men agreed to do so.

At the time trial was scheduled for December, it was not the Government's intention to introduce evidence of this transaction. The decision to elicit proof with respect to this scheme, which was part of the conspiracy, was not made until earlier this week. Consequently, no discovery was made until yesterday. A parallel criminal investigation into others who were also involved in a similar effort to obtain such funds from Drexel has become known to the targets in that investigation and thus disclosure in this case of

the Drexel scheme will no longer compromise that other investigation. Consequently, the Government now intends to introduce this evidence and is providing relevant discovery (bate stamped 903370 to 903393; tape of January 8, 1991 and transcript), in addition to other relevant discovery that was provided yesterday. Finally, certain responses to the bill of particulars and discovery requests, made at a time when the government was not intending to use this evidence will be amended shortly.

Respectfully submitted,

Otto G. Obermaier
United States Attorney for the
Southern District of New York

By:\Signature
Steven M. Witzel
Assistant United States Attorney
Tel. No.: (212) 791-1321

cc: Howard Hawkins, Esq. (w/enclosures)
Fern Schwaber, Esq. (w/enclosures)